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Merger Control

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Japan

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Overview of merger control activity during the last 12 months

Merger control was introduced in Japan by the 1947 Japanese Antimonopoly Act ('the AMA'), together with Japan's first competition rules. Merger control is enforced by the Japan Fair Trade Commission ('the Japan FTC'), which was established as an independent administrative office with broad enforcement powers and is composed of a chairman and four commissioners. The Japan FTC has primary jurisdiction over the enforcement of merger control under the AMA.

According to the latest statistics published by the Japan FTC in June 2015, 289 notifications were made in FY 2014 (1 April 2013 to 31 March 2014) and 275 cases were closed until 31 May 2014 in the Japan FTC's first-stage review process, while 11 notifications were withdrawn before the first stage review was completed. Two cases have been closed in the in-depth second stage review, all of them cleared with remedial measures. The number of notifications substantially declined from 349 in FY 2012, but maintained almost the same number as those of FY 2010 and 2011.

New developments in jurisdictional assessment or procedure

Recent amendments to the merger review regime

Up until the end of June 2011, M&A transactions were usually submitted to the Japan FTC under the voluntary consultation procedure ('the Prior Consultation') prior to the formal statutory filing of a proposed transaction under the AMA, pursuant to the Prior Consultation Guidelines. Under the Prior Consultation, the Japan FTC would make up its mind about a particular case at this early stage and would usually keep to that opinion in the formal notification procedure thereafter.

However, the Japan FTC announced in June 2011 that it would abolish the Prior Consultation as of July 2011, and thus it would no longer provide its conclusion on substantive issues at the pre-notification stage. The abolition of the Prior Consultation means that the review of a proposed transaction would only start at the formal notification.

Informal dialogues with the Japan FTC

The Japan FTC's merger regime has the following two stages after formal notification:

- Phase I. This phase, in which the Japan FTC will review the notification, lasts 30 calendar days (waiting period). The parties must suspend their transaction until the end of this period. At the end of the 30 days, the Japan FTC will either approve the merger (with or without conditions) or open a Phase II review.
- Phase II. In complex cases, the Japan FTC may request additional information from

the parties. The in-depth Phase II review will last 90 calendar days from receipt of all additional information.

In practice, however, the Japan FTC generally accepts informal arguments from notifying parties on substantive issues, and in some cases conducts interviews with third parties (for example, competitors and customers of the parties) under an informal approval from notifying parties even before filings of formal notifications. Close communications of this kind between the Japan FTC and notifying parties would generally accelerate the Japan FTC's review, which in many cases results in early clearance of notified transactions (*see* below, 'Simplified procedure and acceleration') and successful avoidance of extensive Phase II review, and thus are important from a strategic viewpoint.

Review of minority shareholdings

Minority ownership of over 20% of the issued shares in a company is notifiable regardless of whether the acquirer will take control of the target company. As an example of the Japan FTC's enforcement trends, in December 2014 the Japan FTC opened its in-depth Phase II merger review on Oji Holding's purchase of a competitor's shares which would result in the largest Japanese paper manufacturer's 20.9% holdings in a competitor's voting rights. The Japan FTC cleared the acquisition in May 2015 with remedies which would deal with concerns from perspectives of both unilateral and coordinated effects in some of the relevant product markets. This case shows that the Japan FTC is aggressively looking into minority shareholding cases.

Also, in the Japan FTC's substantive review, any companies that are in a close relationship with an acquirer or a target shall generally be deemed to be in a 'joint relationship'. The joint relationship will be determined by taking into account various factors although, according to the Merger Guidelines, a minority shareholding of over 20% and the absence of shareholders with larger shareholding ratios would suffice. Accordingly, these companies will generally be treated as a totally integrated group for the purpose of the substantive analysis and, for example, the Herfindahl-Hirschman Index will also be calculated based on the sales data of the integrated 'joint relationship' group as a whole.

Simplified procedure and acceleration

Although simplified procedures are not available in Japan, it is generally possible to accelerate the review process by way of submitting a written request to the Japan FTC, and according to the latest statistics published by the Japan FTC, the waiting period was shortened in 119 cases, which accounts for 41% of the merger notifications made in FY2015. The Merger Guidelines state that the Japan FTC may shorten the waiting period (30 days) when it is evident that the notified merger may not substantially restrain competition in any relevant market. In practice, prior dialogues between the notifying parties and the Japan FTC would be necessary (*see* above, 'Informal dialogues with the Japan FTC').

Failure to notify

Where there is a failure to notify correctly, the Japan FTC can either: (i) issue a criminal fine of up to two million Japanese yen; (ii) issue a cease-and-desist order to prohibit a merger (even after the parties have implemented the merger), if the merger may substantially restrain competition in the relevant markets; or (iii) file civil proceedings to nullify the merger, within six months of the date the merger is implemented (this is not the case with share acquisitions and business transfers).

In theory, the Japan FTC can take more than one of the above measures, although the Japan FTC does not take this approach in practice. Generally the Japan FTC requests notifying parties to submit a letter which makes clear the reason for the party failing to notify.

Implementation before clearance

The waiting period is 30 days, irrespective of whether or not Japan FTC's review moves on to Phase II. If the parties implement a merger during the 30-day waiting period, this is subject to the same penalty as a failure to notify (that is, a criminal fine of up to two million Japanese yen (*see* above, 'Failure to notify')).

The waiting period will not be extended even if the Japan FTC's investigation moves to Phase II and the parties can therefore close relevant transactions after the waiting period is expired, although in practice the parties generally suspend the transaction until the Phase II review is completed. This means that a closing of the transaction would generally be extended to the completion of the Japan FTC's Phase II review. The only exceptional case which has been publicised so far is an acquisition of shares of Varian, Inc. by Agilent Technologies, Inc., which was concluded before the Japan FTC's completion of its Phase II review.

Although it is at least theoretically possible for parties to implement a merger after the 30-day period and before the Japan FTC grants its formal approval (as stated), the Japan FTC can still order a cease-and-desist order requiring the parties to take some measures (for example, structural measures such as the transfer of business or business restructure) even after the completion of notified transactions.

Third-party access to the file and rights to challenge mergers

(i) Access to the file

Complainants have no right to access the merger notification files. Further, according to the Policy for Merger Review, the Japan FTC will disclose a short summary of the proposed merger only if the review moves on to Phase II. This means that third parties cannot confirm whether a merger has actually been notified, unless such disclosure from the Japan FTC happens (*see* below, 'Approach to remedies').

(ii) Rights to challenge mergers

Interventions by interested parties in the Japan FTC proceedings have not historically been common in Japan. This practice has, however, started to change as exemplified by interventions made before the Japan FTC in relation to the proposed BHP Billiton/Rio Tinto joint venture case by Japanese steel manufacturers, as reported by the Japanese press.

There are two ways for complainants to make a submission to the Japan FTC in the course of a merger review: (i) to notify the investigation bureau of a possible breach of the AMA; and (ii) to notify the mergers and acquisitions divisions. With regard to notifications to the investigation bureau, anyone can submit notifications of a possible breach of the AMA. In addition, actual practice indicates that in some cases complaints have been made with the mergers and acquisitions division, although there is no explicit provision in the AMA for such submissions.

Also, the Policy for Merger Review states that, in case a merger review moves on to Phase II, the Japan FTC will invite opinions and comments from third parties. Public hearings can be held if deemed necessary, but they have been extremely rare to date.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

Key industry sectors

Although the Japan FTC did not specify any specific industry sectors as an enforcement focus, mergers in the retail sector have recently been closely monitored and reviewed in detail in the

Phase II reviews. Illustrative examples thereof are the reviews on: the proposed acquisition of shares of Daiei, Inc. by AEON Co., Ltd.; and the proposed acquisition of shares of BEST Denki by Yamada Denki. In the Daiei/AEON case, the Japan FTC conducted a Phase II review and unconditionally closed the case in July 2013. In this case both AEON and Daiei engaged in the supermarket business, and the Japan FTC defined the geographic range for each store to be an area within a radius of 500 to 3,000 metres of each store (which varies depending on the store location, size, and other factors) and conducted substantive competitive analysis for each of these geographic areas. In the Yamada/BEST case, where both companies were retailers dealing in electrical appliances for consumers, the Japan FTC defined "the area within a ten-kilometre radius of each store" as the geographic range, after the Japan FTC interviewed competitors of the notifying parties and confirmed that many of them deemed the area of ten-kilometre radius of the store as their sales area. The Japan FTC conducted its Phase II review and closed the case in December 2012 with conditions of divestiture of several stores.

Another industry sector which the Japan FTC is thoroughly investigating is the paper manufacturing industry. It appears from recent press releases by the Japan FTC that it is focusing on regulating coordinated behaviours in oligopolistic industries, especially a concerted practice where a unilateral public announcement of a price increase is followed by public announcements by other competitors. The Japan FTC recently opened two Phase II reviews on concentrations in the paper industry − Oji/Chuetsu case (see above, "Review of minority shareholdings") and Nippon Paper I/Tokushu Tokai Paper case – and conducted extensive reviews which involved detailed economic analysis and interviews with competitors, distributors and customers, and publicised detailed reports about the coordinating nature of the paper industry after it cleared these respective transactions.

Introduction of "global" market

The Merger Guidelines clarify the category of M&A transactions whose impact on competition should be reviewed. Detailed rules are provided for market definition. Importantly, the Merger Guidelines were amended in 2007 to clarify that the geographic market may be wider than the geographical boundaries of Japan, depending upon the international nature of the relevant business.

This means that it is much more likely that consolidation within certain sectors of the Japanese economy that are faced with competition from foreign imports, for example, will be easier because the widening of the actual geographical market may dilute their national market shares. Following the 2007 amendment to the Merger Guidelines, there have been several cases where the Japan FTC defined the relevant geographical market to extend beyond Japan.

One example involved TDK Corporation's acquisition from Alps Electric Co, Ltd of fixed assets used for the manufacturing of magnetic heads. The Japan FTC ultimately determined that the proposed acquisition would not substantially restrain competition in any relevant market. This decision was reached on the basis of a number of factors, including the consideration that, post-acquisition, TDK would not be able to control prices because of the presence in the relevant market of a number of other significant competitors with excess supply capacity. Significantly, the Japan FTC decided that the relevant market consisted of the global market for magnetic heads. It is understood that the Japan FTC reached this conclusion based on its finding, among others, that magnetic head manufacturers sell their products at the same price regardless of the customers' geographical location.

It is likely that the Japan FTC will continue to define geographical markets that extend beyond Japan when assessing future transactions, although this depends on the actual conditions of competition.

Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

Economic analysis has not been commonly used in the Japan FTC's merger review for a long period, with only several exceptions in 2006 and 2007 where cross-elasticity has been taken into consideration, but recently the Japan FTC is moving towards more aggressive use of economic analysis in its merger review, and explicitly mentions this in its press releases.

For example, in the Japan FTC's review of acquisition of shares of BEST Denki Co., Ltd. by YAMADA Denki Co., Ltd, the Japan FTC explicitly mentioned that the results of economic analyses, which were undertaken based on the financial data and POS (point of sales) data of each store, have been taken into consideration in its substantive analysis. In its review on the proposed acquisition of shares of C&H Co., Ltd. by DAIKEN Corporation, the Japan FTC conducted questionnaire surveys with users and competitors in order to assess substitutability between different types of products, and determined that there was no need to define the relevant market separately for hardwood MDF and softwood MDF, as the Japan FTC confirmed through the surveys that MDF users recognise hardwood MDF and softwood MDF as substitutable. In addition, in the Oji/Chuetsu case (see above, "Review of minority shareholdings") the Japan FTC conducted a price correlation analysis in defining relevant markets, by calculating a correlation coefficient. These examples clearly show that the Japan FTC has been gaining experience of applying basic economic principles to merger review.

The Japan FTC currently has two economists within its merger review department and generally checks and examines economic analyses which have been produced by notifying parties and complainants. Especially in complex cases where the Japan FTC opens in-depth Phase II reviews, it will also conduct its own economic analysis based on data and information which have been provided by notifying parties and third parties.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

Timing of remedy proposal

Remedies can be offered by the parties and accepted by the Japan FTC at any time during the Japan FTC's review period, namely: (i) within the Phase I review period to avoid in-depth Phase II investigation; and (ii) following the Japan FTC's opening of in-depth Phase II investigation. If a notifying party and the Japan FTC reach an agreement on remedies, the notifying party is generally requested to submit a report of change to incorporate the remedy into the original notification.

As a practical matter, the Japan FTC will disclose a short summary of the proposed merger only after the review moves to Phase II, and thus third parties remain unaware that a merger has been notified unless the Japan FTC makes such a disclosure. Therefore, some notifying parties may prefer to offer remedies in the early stage of merger review, in order to avoid any disclosure of the fact of filing of notification or the relevant transaction itself through the Japan FTC's public announcement of the opening of Phase II review.

In addition to this, each of the Phase I and Phase II review periods cannot be extended, even in cases where parties submit a remedy proposal to the Japan FTC, nor can the Japan FTC "stop the clock", and this may cause difficulties, especially in global merger notifications where the management of the filing schedule is important to avoid conflicting remedies or prohibition decisions at the end of the merger review procedure in various jurisdictions.

Behavioural remedies

In principle, the remedies that the Japan FTC will impose as a condition of clearance of a transaction would be structural, for example the transfer of a business, according to the Japan FTC's Merger Guidelines. Having said that, the Japan FTC also recognises that there may be cases where it is appropriate to adopt certain types of behavioural measures.

In the acquisition of Cymer by ASML, ASML has proposed that it would take measures against the handling of confidential information, including: (i) directors/employees of Cymer who are responsible for the confidential information of Company X or Company Y will be prohibited from providing the confidential information to directors/employees of ASML and enter into a non-disclosure agreement; and (ii) directors/employees of ASML who are responsible for the confidential information of Company ASML will be prohibited from providing the confidential information to directors/employees of Cymer and enter into a non-disclosure agreement, based on which the Japan FTC cleared the case in its Phase II review. Measures against the handling of confidential information have been accepted by the Japan FTC as appropriate also in Oji/Chuetsu case (see above "Review of minority shareholdings") as well, which suggest that the Japan FTC is becoming more flexible in assessing and accepting behavioural measures.

Use of independent monitoring trustees for ensuring compliance with remedies has been very rare to date in Japan, but in the above Cymer/ASML case, the notifying party proposed that it would assign an independent monitoring team and the team would report to the JFTC about the party's compliance with the proposed behavioural remedies, and the JFTC accepted it.

Penalties against breaches of remedies

Compliance with remedies is not monitored by the Japan FTC or other entities, as the AMA does not have any provision which grants the Japan FTC the power to monitor notifying parties or instruct them to take specific measures in order to comply with the approved remedies. The Japan FTC can, however, penalise the parties for breaches of the offered remedies that have been incorporated into the original notification, should such breach cause a substantial impediment of competition in any of the relevant markets.

Key policy developments

Cooperation between the Japan FTC and foreign competition authorities

The Japan FTC has entered into bilateral cooperation agreements with the competition authorities of each of the United States, the European Union and Canada, and also entered into MOU with younger agencies such as Chinese Ministry of Commerce in April 2016. Under these agreements, various levels of information exchange and discussion can be made between the participating authorities, although sharing of evidence is basically not permitted. The Japan FTC is entitled to exchange information with other authorities as well, based on the conditions set out in the AMA, and waivers submitted by notifying parties. The Japan FTC is said to have requested notifying parties to submit waivers for exchange of information, in high-profile merger cases which would likely be subject to filing obligations not only in Japan but also in other jurisdictions.

As Japan FTC's coordination with foreign authorities seems to be becoming more frequent and detailed, coordination among Japanese and foreign attorneys who represent notifying parties is of great importance, and informal dialogues between Japanese attorneys and the Japan FTC (*see* above, 'Informal dialogues with the Japan FTC') would be especially

important to prompt and support the Japan FTC's discussions and coordination with foreign competition authorities.

Among the cases for which the Japan FTC recently published the results of its review, the Japan FTC and foreign competition authorities have launched investigations and the Japan FTC exchanged information with the US Federal Trade Commission and the European Commission in the Zimmer/Biomet case, which the Japan FTC cleared in March 2015.

Regulation on foreign-to-foreign mergers

The amendment to the AMA effective as of January 2010 has made clear that foreign-to-foreign mergers, between undertakings which have no Japanese subsidiary or branch office in Japan but which have substantial domestic turnover in Japan, would be notifiable as long as the relevant notification threshold is met. It appears from the Japan FTC's stance in the case of BHP Billiton's attempt to take over Rio Tinto through a hostile bid (*see* above, 'Third-party access to the file and rights to challenge mergers') that the Japan FTC will not hesitate to fully investigate foreign-to-foreign mergers that may have a substantial impact on competition in Japan by cooperating and exchanging information with foreign competition authorities. The JFTC's attitude towards aggressive review and enforcement on foreign-to-foreign mergers is continuing, for example in the abovementioned Cymer/ASML case and Zimmer/Biomet case.

Reform proposals

The Cabinet Office published a Bill for the amendment of the AMA with the aim of abolishing the current administrative hearing procedure in favour of a more detailed judicial appeal procedure. This bill passed in December 2013 and took effect as from April 2015.

The outline of the Bill included the following proposed changes: (i) repeal of the Japan FTC's administrative hearing procedure for appeals of Japan FTC orders, to be replaced by an enhanced hearing procedure prior to the issuance of orders; and (ii) the introduction of a system in which addressees of the Japan FTC's orders can appeal to the Tokyo District Court, then to the Tokyo High Court, and finally to the Supreme Court, thereby giving addressees three different levels of judicial appeal.

Accordingly, appeals against the Japan FTC's cease-and-desist orders will be dealt with by the Tokyo District Court, instead of through the Japan FTC's administrative hearing procedure. Practitioners generally expect that this will introduce more transparent and fair appeal procedures.

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Kentaro Hirayama works primarily in the field of antitrust law. His skills and experience are widely recognised and he has been listed as a leading Japanese competition lawyer in Chambers Asia-Pacific (2013-2016). Mr Hirayama recently was named to Global Competition Review's "40 Under 40" 2015 list of the world's leading antitrust and competition lawyers under the age of 40, in which he is the only Japanese attorney listed.

In addition to his professional experience, he worked for the Japan Fair Trade Commission (2007–2010), where he was a case manager in the Marine hose case, other high-profile international cartel cases and an abuse of dominance case. In the course of these worldwide parallel investigations, he also engaged in information exchanges and other collaborations with foreign competition authorities.

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